

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2007-0250, State of New Hampshire v. Leonard Valliere, the court on March 6, 2008, issued the following order:

The defendant, Leonard Valliere, appeals his convictions for aggravated felonious sexual assault, felonious sexual assault, indecent exposure, attempted sexual assault and endangering the welfare of a child. He argues that the trial court erred in: (1) admitting evidence that the victim's sister was upset after talking with her; (2) allowing the prosecutor to refresh the victim's recollection; and (3) ruling that the State's second bill of particulars provided sufficient factual specificity for three of the indictments. We affirm.

We review the trial court's ruling on the admissibility of evidence under our unsustainable exercise of discretion standard. State v. White, 155 N.H. 119, 123 (2003). The defendant argues that evidence that the victim's sister was upset after talking to the victim conveyed a belief that the victim's allegations were true. See State v. Lopez, 156 N.H. ___, ___, 937 A.2d 905, 911 (2007) (requiring witness to opine upon credibility of other witnesses is error). The defendant's argument requires two assumptions: (1) that the victim told her sister about the charged assaults; and (2) that her sister believed her. Even if we assume that these assumptions are correct and that the limited testimony concerning her reaction was error, we conclude that it was harmless. See State v. Pseudae, 154 N.H. 196, 202 (2006) (error is harmless if State establishes that error did not affect verdict; we review strength of evidence State presented at trial and character of challenged evidence, including whether it was inconsequential). The victim's mother had already testified that when the victim reported the assaults to her, the mother accused the defendant, believed the victim when the defendant denied the allegations and told him to "get your stuff and get out of my house." The young victim also testified in detail about the assaults.

The defendant next argues that the trial court erred in allowing the State to refresh the victim's recollection. Although the defendant argues on appeal that the trial court did not consider the risk that the victim would testify as to what she read rather than her independent recollection, it is not an argument that he presented to the trial court. Accordingly, we will not consider it on appeal. See State v. Bean, 153 N.H. 380, 385 (2006). We note, however, that a review of the victim's testimony on direct examination indicates that she distinguished between the contents of the report and her independent recollection. We also find unpersuasive the defendant's argument that the trial court failed to ascertain whether the victim's memory was exhausted. "It is

well-settled that counsel can use a prior statement to stimulate the recollection of a witness who demonstrates a doubtful memory while testifying.” State v. Cote, 143 N.H. 368, 372 (1999). The trial court is in a unique position to view the demeanor of witnesses and thus retains the discretion to determine whether a witness lacks present recollection. *Id.* Based upon the record, we find no error in this ruling.

The defendant also contends that the trial court erred in ruling the State’s second bill of particulars contained sufficient factual specificity. He contends that the bill of particulars failed to provide any information pertaining to the allegation contained in indictment 06-2128; specifically, he argues that it failed to specify when and where the assaults had occurred. Because this indictment also formed part of the basis of indictment 06-2127, he argues that his convictions on both indictments should be reversed. Time is not an element of the sexual assault offenses charged in the challenged indictments. *See* RSA 632-A:2. The defendant does not articulate how a more specific statement would have allowed him to prepare his defense; accordingly, we find no merit in his claim of error. *See State v. Dupont*, 149 N.H. 70, 77 (2003).

The defendant also argues that indictment 06-2136 was duplicitous because it alleged a single act but the bill of particulars described two separate assaults. A bill of particulars is intended to provide sufficient specificity to charged crimes to allow a defendant to prepare for trial, protect against double jeopardy and insure a unanimous jury verdict. *Id.* at 76; N.H. CONST., pt. I, art. 15. In this case, although the bill of particulars described two separate acts, at trial, the victim testified as to only one act as described in indictment 06-2136. Specifically, she testified that one act occurred at the residence where she lived during the time charged in 06-2136; she also testified that a similar assault occurred at a residence where she had lived during the time frame alleged in indictment 06-2137. Because the State limited the victim’s testimony to a single act as alleged within the time frame within the indictment, the defendant’s constitutional guarantees were protected. *Cf. State v. Woodard*, 146 N.H. 221, 227-29 (2001).

Affirmed.

DUGGAN, GALWAY and HICKS, JJ., concurred.

**Eileen Fox,
Clerk**